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Supreme Court, U.S.
FILED
MAR 1? 2001
OFFICE OF THE CLERK

No. 00-1210

IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioner,

v.

STEVE GARVEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI[1]

Respondent Steve Garvey's brief in opposition is so evasive as to be a tacit admission against interest. Respondent does not even attempt to rebut the main point of our certiorari petition – that the Ninth Circuit's decisions here greatly expand the judicial role in reviewing arbitration awards in conflict with the decisions of this Court and the other courts of appeals, and by so doing, work the most serious harm to the federal labor arbitration regime.

Instead, Respondent argues that this Court lacks jurisdiction over one of the two decisions below and that, in any event, the court of appeals' approach is limited to its review of *this* arbitration award and is thus of limited interest. Respondent is wrong on both counts.

1. The bulk of the opposition brief is devoted to the baseless argument that this Court does not have certiorari

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[1] It is worthy of note that Respondent like Petitioner accepts the statement of the case in the court of appeals' February 10, 2000 decision. Opposition ("Opp.") 3. Thus, there are no factual or procedural matters in dispute here that cloud the pure questions of law we present in our certiorari petition.

At the same time Respondent does seek to have it both ways by embellishing on that statement of the case where it suits his fancy. For example, Respondent suggests that he did not submit evidence demonstrating that he received an offer to extend his contract until the July 2, 1996 hearing before the Arbitrator, because he did not know such evidence was required. Opp. 2-3. Respondent does so even though (i) he then acknowledges that the Arbitrator articulated the required standard on February 14, 1994, two years before his hearing, *id.*; and (ii) he offers no explanation for the questionnaire responses he submitted to the MLBPA, in which he gave an account of his contract extension negotiations that did not include the actual offer to extend that he now contends was made in 1985, *see* Pet. 5-6.

jurisdiction to review the February 2000 court of appeals' decision in this case. Opp. 3-8.

The short answer is that the February 2000 decision does not stand alone, but rather is the first of *two related Ninth Circuit decisions in a single case*.[2] And, it is well established that this Court "has jurisdiction to consider all the substantial federal questions determined in the earlier stages of the litigation, and it is enough if certiorari is sought within 90 days following the second or last of the judgments rendered below." Stern et al., *Supreme Court Practice* § 6.4, at 289 (1993) (citing, *inter alia*, *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973); *Urie* v. *Thompson*, 337 U.S. 163, 171-73 (1949); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955)).[3]

Indeed, this Court manifestly has jurisdiction to review the December 2000 decision under the test articulated in *FTC* v.

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[2] In its February 2000 decision, the court of appeals vacated an arbitration award and remanded the matter to the district court; the district court, in turn, remanded the matter for *de novo* arbitration, but did not dismiss the case. Pet. App. 7a. Garvey then challenged the order remanding the case for *de novo* arbitration; and in December 2000, the court of appeals issued a second decision *reversing the district court's order* and instructing the district court to remand the case to the Arbitration Panel with instructions that it "*enter an award in favor of Garvey in the amounts claimed by him before the Panel.*" *Id.* at 3a (emphasis supplied).

[3] *See* Stern et al., *supra* at § 2.2, at 40 ("the Court on certiorari to review a final decree can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made to secure review of the interlocutory decree or even though such an attempt was made without success") (citing numerous cases); *id.* at § 4.18, at 198 (explaining that denial of certiorari at an earlier stage of a proceeding is without prejudice to "[a] renewal of the questions presented when certiorari is later sought from the final judgment") (citing *inter alia*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Reece*, 350 U.S. at 87; *Urie*, 337 U.S. at 172-73; *Hughes Tool Co.*, 409 U.S. at 365 n.1).

Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952), the case relied upon by Respondent in his opposition brief at 7-8. There, in a portion of the decision not quoted by Garvey, the Court held that where a second or revised decision of a court of appeals "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered," the time to petition for certiorari review of matters contained in *both* decisions begins to run anew. 344 U.S. at 211 (footnotes omitted).[4]

If the December 2000 Court of Appeals' decision does not "change a matter of substance" in that court's February 2000 decision, at the very least, the latter "resolves a genuine ambiguity" in the former. The second Court of Appeals' decision (i) *reversed* a district court decision which, in apparent accord with the first Court of Appeals' decision vacating the arbitration award, had remanded this case for "*de novo* arbitration hearings," Pet. App. 7a; and (ii) instructed the district court to instead remand the case with orders to the Arbitration Panel "to enter an award in favor of Garvey in the amounts claimed by him before the Panel." *Id.* at 3a. The second decision thus transmuted the first decision vacating the award into a judicial decision on the merits by taking the added step of mandating an award in the grievant's favor. As the Court of Appeals said in its second decision, "the blame

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[4] *See also* Stern et al., *supra* § 6.4, at 287 ("the time in which to petition for certiorari begins to run anew from the revised judgment of the court below" where the new decision "'changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered'"); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965) (because "the court's second opinion resolved a genuine ambiguity in the first, . . . the time within which certiorari had to be requested dates from the second judgment"); *Burlington N., Inc.* v. *United States*, 459 U.S. 131, 138 n.5 (1982) (holding that the Court "plainly" had jurisdiction "[b]ecause the June 1981 decision 'resolve[d] a genuine ambiguity in a judgment previously rendered'") (second alteration in original).

may be ours, in part, for failing to make our instructions clear." *Id.*[5]

2. To the extent that the Respondent's Opposition treats with the questions presented, it seeks to trivialize the decisions below, by arguing that the underlying arbitration is *sui generis* and that the Ninth Circuit's appropriation of the Arbitrator's role is not to be taken as precedent setting. Opp. 7-9. But the Ninth Circuit's usurpation is too plain to be missed – that court first found the facts for the Arbitrator (and rejected the Arbitrator's fact findings and credibility determinations) and then entered an award for the grievant (and overturned the Arbitrator's determination that the grievant was not entitled to damages). Certainly the thin veil of "limiting" statements Respondent invokes does nothing to hide the Ninth Circuit's judicial determination of the arbitration's merits and the ensuing judicial arbitration award.

Respondent first relies on the statement by the Ninth Circuit that the circumstances of this arbitration are "'unique.'" Opp. 9 (quoting App. 29a).[6] But, as the Statement of Interest of *Amicus Curiae* Office of the Commis-

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[5] Garvey's "separate" argument that "the MLBPA is foreclosed from raising the issues addressed and decided" in the February 2000 decision, *see* Opp. 5-7, is no different from his jurisdictional argument in any way that we have been able to discern, and it suffers from the same flaw as the jurisdictional argument.

[6] In particular, the Ninth Circuit asserted without citation that the arbitration lacked "the perspective provided by the adversarial process" and the "guidance provided by an established law of the shop." Pet. App. 28a. As to the first, the court below is flatly wrong. Under the process as described earlier in the panel opinion, the MLBPA proposes a distribution plan; players may object to the MLBPA's proposals; an objection hearing is held before the Arbitrator; and the Arbitrator independently determines whether the player's objection should be sustained. *Id.* at 9a-11a. *See also infra* at 5. As to the second, again the decision below itself reveals that damages from the collusion settlement fund are awarded based on an "established law of the shop," to wit, the standards usually applied in salary arbitration. *See id.* at 12a-13a.

sioner of Baseball plainly reveals, the underlying arbitration is simply one of the many disputes between the MLBPA and the Clubs that the parties "ha[ve] contractually agreed to commit to the arbitration process" and the decision below thus deprives the bargaining parties of "the benefit for which [they] have bargained." *Id.* at ii. Equally to the point, the arbitration affects not just the interests of Garvey, the MLBPA and the Clubs, but the interests of the hundreds of other claimants seeking damages awards from a *fixed* settlement fund. The "uniqueness" label is thus a misnomer. This was a straightforward labor arbitration – albeit one that affected hundreds of players – in the context of an established and long standing bargaining process.[7]

Second, Respondent asserts that the Ninth Circuit was correct in concluding that *United Paperworkers International Union* v. *Misco, Inc.*, 484 U.S. 29 (1987), rather than governing this case, is of no moment here. Opp. 9. In *Misco*, of course, this Court explained that after vacating an arbitration award, "the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement." 484 U.S. at 40 n.10. Contrary to the Ninth Circuit, that explanation is not limited to cases of arbitral "procedural aberration" or "procedural error." Pet. App. 3a n.4. The *Misco* Court, in fact, stated that "*[e]ven*" in cases involving "procedural aberrations [that] rise to the level of affirmative misconduct," there may be *no* such

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[7] The court of appeals' soothing reassurances that this is an extraordinary case of extraordinary arbitral error calling for an extraordinary judicial response (Pet. App. 29a) are equally empty. On any objective evaluation, the Arbitrator's findings are solidly based on the record evidence; the only fact finding error here was that of the court of appeals. The truth of the matter is that the Ninth Circuit's activist approach in this case is not subject to any discernible limiting principles.

foreclosure. 484 U.S. at 40 n.10 (emphasis supplied). It follows that where the alleged arbitral error is in finding the facts or in making credibility decisions, "the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. . . . [or] remand for further proceedings when this step seems appropriate." *Id.* What the court cannot do under this Court's jurisprudence is issue its own judicial decision on the merits – *viz.*, what the Ninth Circuit did here.

Finally, relying on his argument that the Court lacks jurisdiction to review the February 2000 court of appeals' decision, Respondent contends that no published decision of the Ninth Circuit is before the Court. Opp. 5. But the failure of the jurisdictional argument destroys his premise. And, in any event, the Ninth Circuit's improper arrogation to itself of the role of Arbitrator is, as we have explained, fully displayed in both opinions addressing the single arbitration award at issue here. While it is in Garvey's interest to pretend that the Ninth Circuit followed established law and a regular order here, the opposite is true.

* * * *

In the decisions below, the Ninth Circuit substituted judicial decision-making for the parties' choice of arbitral decision-making in conflict with other courts of appeals and in contravention of the labor arbitration principles stated by this Court in *The Steelworkers Trilogy* and its progeny. This Court should grant the petition for certiorari to bring the Ninth Circuit's labor arbitration law into line with that of the other courts of appeals and with the basic principles of the federal arbitration system. The Court may also wish to consider summary reversal to correct the fundamental and substantial errors in this case.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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